

BEFORE THE
CALIFORNIA HORSE RACING BOARD
STATE OF CALIFORNIA

In the Matter of the Purse Forfeiture
Appeals of:

WILLIAM MEZO
ALANNA PENA, and
GREGG PISTOCHINI,

OAH Nos. N1999070483
N1999070485
N1999070486

Appellants.

PROPOSED DECISION

On August 24, 1999, these consolidated purse forfeiture appeals were heard by Raymond J. Leonardini, Administrative Law Judge, Office of Administrative Hearings, State of California. After additional briefing by the parties the matter was submitted. The proposed decision granting the appeals was signed on October 28, 1999. The California Horse Racing Board considered the Administrative Law Judge's Proposed Decision in closed session during the Board's regular meeting on December 3, 1999. Pursuant to Government Code, section 11517, subsection (c) the Board remanded the matter. The Board specifically asked for additional evidence to establish whether the subject horses were tested and whether the tests were found to be positive for a prohibited drug substance. In particular, the Board requested further evidence on whether the horses gave an official test sample that contained a prohibited substance under the ambit of Rule 1859.5, Rules of the California Horse Racing Board (Title 4, Division 4, California Code of Regulations). Finally, the Board requested that the new Proposed Decision prepared in the remanded case consider all issues in the case, including disqualifications, forfeitures of purses, and the distribution of the purses.

Accordingly, on February 29, 2000, the remanded appeals cases were heard by Raymond J. Leonardini, Administrative Law Judge, Office of Administrative Hearings, State of California.

The California Horse Racing Board (hereinafter “CHRB” or “Board”) was represented by A. Kay Lauterbach, Deputy Attorney General, California State Department of Justice.

Appellants were all represented by David M. Shell of the Law Offices of David M. Shell. During the hearing, prior to the Board’s presentation of additional evidence, and subsequent to several rulings on appellants’ jurisdictional objections, Mr. Shell chose to depart the proceedings without any reservation of rights, substitution of counsel, or motion for termination of representation. At the time of his departure, he offered prospective objections to evidence he believed the Board would submit.

Evidence was received, the record was closed, and the matter was submitted.

FINDINGS OF FACT

1. These three appeals arise out of a similar factual background with common questions of law. As a result, the three cases were consolidated for hearing and determination. *Government Code section 11507.3.*

2. William Mezo, Alanna Pena, and Gregg Pistochini, (hereinafter “appellants”), are owners of horses which raced at the Cal Expo Harness Meet in May 1998.

3. On April 16, 1999, nearly 11 months subsequent to the subject Meet, the California Horse Racing Board of Stewards issued three rulings in the form of separate single-page letters.

4. The first ruling was issued to William Mezo, owner of *Grady’s Falcon*, the second-place finisher of the tenth race at Cal Expo Harness Racing on May 23, 1998, pursuant to rule 1859.5. The ruling orders the return of the purse money earned from the race under rule 1760. The ruling alleged that *Grady’s Falcon* tested positive for the prohibited drug clenbuterol in testing following the race in May 1998. The CHRB’s official laboratory, Truesdail, tested the post-race urine samples taken from appellant’s horse and found that it contained clenbuterol in violation of CHRB rules. Appellant Mezo exercised his right to have a second test performed, by a testing lab recognized by the CHRB, and the sample tested positive for clenbuterol.

5. The second ruling was issued to Alanna Pena, owner of *Cutting Edge*, the first-place finisher of the eleventh race at Cal Expo Harness Racing on May 23, 1998, pursuant to rule 1859.5. The ruling orders the return of the purse money earned from the race under rule 1760. The ruling alleged that *Cutting Edge* tested positive for the prohibited drug clenbuterol

in testing following the race in May 1998. The CHRB's official laboratory, Truesdail, tested the post-race urine samples taken from appellant's horse and found that it contained clenbuterol in violation of CHRB rules. Appellant Pena exercised her right to have a second test performed, by a testing lab recognized by the CHRB, and the sample tested positive for clenbuterol.

6. The third ruling was issued to Gregg Pistochini, owner of *Level Starlet*, the second-place finisher of the ninth race at Cal Expo Harness Racing on May 22, 1998, pursuant to rule 1859.5. The ruling orders the return of the purse money earned from the race under rule 1760. The ruling alleged that *Level Starlet* tested positive for the prohibited drug clenbuterol in testing following the race in May 1998. The CHRB's official laboratory, Truesdail, tested the post-race urine samples taken from appellant's horse and found that it contained clenbuterol in violation of CHRB rules. Appellant Pistochini exercised his right to have a second test performed, by a testing lab recognized by the CHRB, and the sample tested positive for clenbuterol.

7. Following the issuance of the rulings, each of the owners filed an appeal under section 1761 of the CHRB rules.

8. On July 17, 1999, the CHRB issued a Statement of Decision of the Board of Stewards regarding the matter of appellant William D. Mezo (State's Exhibit #5). In the ruling portion of this Statement the Board of Stewards held that appellant Mezo was "suspended, commencing Saturday, July 24, 1999 for violation of CHRB rule 1760." No other appellant received a similar Statement. The suspension of appellant Mezo is not before this court, only the rulings communicated to each appellant on April 16, 1999.

9. On July 30, 1999, each appellant received an Order Granting Stay (Conditional) from the April 16, 1999 ruling of the Board of Stewards.

10. On August 12, 1999, the Board issued three Notices of Hearing to the three appellants pursuant to section 1414, Title 4, California Code of Regulations. The Notice contained the language that appellants "will have the opportunity to present any new and relevant evidence" at a hearing scheduled for August 24, 1999.

11. At all time relevant to the forfeiture, Title 4 CCR §1859.5 Disqualification upon Positive Test Finding provided that: "A finding by the stewards that an official test sample from a horse participating in any race contained a prohibited substance as defined in this article, and which is determined to be in class levels 1-3 as established in Section 1843.2 of this article, unless a split sample tested by the owner or trainer pursuant to Section 1859.25, fails to confirm the presence of a prohibited drug substance determined to be in class levels 1-3 shall require disqualification of the horse from the race in which it participated and forfeiture of any purse, award, prize or record for such race and the horse

shall be deemed unplaced in that race. Disqualification shall occur regardless of culpability for the condition of the horse.”

12. Jack W. Abrahams, DVM was the official State Veterinarian at Cal Expo on May 22 and May 23, 1998. Dr. Abrahams testified that clenbuterol is a drug foreign to a horse within the meaning of Title 4 CCR section 1843.1, and established that clenbuterol is a Class 3 drug pursuant to Board Rule 1843.2.

13. Among his other duties, Dr. Abrahams DVM managed the test barn and supervised the veterinarian assistants during the Cal Expo Harness Meeting racing season. The veterinarian assistants were hired by the Board, but paid by Capitol Racing, and at all times relevant to these matters held valid Tester licenses issued by the Board. During the spring 1998 meet, Evidence Clerk Melissa Daugherty, Test Barn Custodian Sarah Hines, and veterinarian assistants Jon Phemister, Sarah Montross and Gary McArthur were supervised by Dr. Abrahams. They worked at a six-stall test barn which also contained an office and an evidence room. Each veterinarian assistant had a stall and was given a specific horse to test.

14. Dr. Abrahams described the standard urine collection process used by the veterinarian assistants in the test barn for every sample taken. The Test Barn Custodian assigned the veterinarian assistants to test specific horses in designated stalls. Every winning horse and nine horses selected at random were tested every evening. A master sheet of the names, tattoo numbers and descriptions of all horses racing in the event was maintained by the Test Barn Custodian. A veterinarian assistant obtained the horse’s tattoo number from the master list to confirm the identity of the tested horse by later visual inspection.

15. The Evidence Clerk prepared documents used in the collection and handling of blood and urine specimens and assured that information was completed correctly and samples stored securely. For every collection process the veterinarian assistant obtained from the Evidence Clerk an Acknowledgment of Test Sample form containing the sample identification number, track name, date; a large and a small sealed and sterilized urine sample container; and security seals for both containers. The veterinarian assistant recorded on this form the horse’s name, tattoo number, and racing number. The veterinarian assistant checked the license of the groom who brought the horse to the test barn, assured that it was current, matched the individual present, and recorded the groom’s name, license number, and expiration date on the form. The veterinarian assistant also checked that the horse’s tattoo matched the tattoo number recorded from the master list onto the Acknowledgment of Test Sample form.

16. In the assigned stall the veterinarian assistant would break the security seal on the large main sample jar and collect the sample. The groom could witness the collection of samples through a slot opening in the stall door. After collection of the sample, the groom

would return to the test stall. In the groom's presence the veterinarian assistant would break the seal of the smaller split sample container and pour a portion of the main sample into it. The respective lids were then screwed onto the two containers. The veterinarian assistant would sign and record the time on the Acknowledgment of Test Sample form. The veterinarian assistant would then place the security seal for the main sample under the signature line on the form so that the top half of the groom's signature appeared on the form and the bottom half on the security seal. The signed security seal was then applied over the lid and sides of the main urine sample container so that it adhered to both the lid and the container. Then the veterinarian assistant and the groom initialed the security seal for the split sample container, which was applied over the lid and sides of the smaller container so that it adhered to both the lid and container. The veterinarian assistant then reviewed the Acknowledgment of Test Sample form for completeness and accuracy and took the form to the Evidence Clerk, who also reviewed it for completeness and accuracy.

17. According to Dr. Abrahams, the Test Sample Shipping Invoice is also prepared by the Evidence Clerk under his general supervision. This document records the test sample identification number of each horse tested, whether blood and/or urine was taken, the date of the test, along with a "security tag". This invoice is enclosed and locked in an ice chest for shipping to the testing lab.

18. Finally, the CHRB Official Veterinarian Report is completed by the Evidence Clerk. This document includes the name of the horse and sample identification number and any medication given to the horse. The form is reviewed by Dr. Abrahams and signed or stamped by him. The signature or stamp is an indication that the information on the document is correct. This document is also included in the ice chest which is locked, and placed in the freezer in the Evidence Room on the premises. A further security tag is placed on the ice chest which can only be removed by cutting it which would destroy the tag. The ice chest stays in the Evidence Room inside the freezer. It is taken out of the freezer by the authorized shipper who removes the ice chest in the presence of a security guard of the CHRB for shipping to the testing lab.

Level Starlet

19. On May 22, 1998 at the Capital Harness meet at Cal Expo Race Track, "Level Starlet" was entered in and ran in the ninth race, finishing second. Veterinarian Assistant Jon Phemister, pursuant to his regular practice, obtained from Evidence Clerk Melissa Daugherty an Acknowledgment of Test Sample form, and sample seals, identified the horse by the tattoo number, collected the sample in the usual fashion, and completed the documents by obtaining the signature of the witness, Ruben Martinez. He then reviewed the Acknowledgment of Test Sample form and took the form to Ms. Daugherty.

Cutting Edge

20. On May 23, 1998 at the Capital Harness meet at Cal Expo Race Track, “Cutting Edge” was entered in and ran in the eleventh race, finishing first. Veterinarian Assistant Sarah Montross, pursuant to her regular practice, obtained from the Evidence Clerk an Acknowledgment of Test Sample form, and sample seals, identified the horse by the tattoo number, collected the sample in the usual fashion, and completed the documents by obtaining the signature of the witness, Jeffery C. Hollis. She then reviewed the Acknowledgment of Test Sample form and took the form to Ms. Daugherty.

Grady’s Falcon

21. On May 23, 1998, at the Capital Harness meet at Cal Expo Race Track, “Grady’s Falcon” was entered in and ran in the tenth race, finishing second. Veterinarian Assistant Gary McArthur, pursuant to his regular practice, obtained from the Evidence Clerk an Acknowledgment of Test Sample form, and sample seals, identified the horse by the tattoo number, collected the sample in the usual fashion, and completed the documents by obtaining the signature of the witness Tricia A. McConnell. He then reviewed the Acknowledgment of Test Sample form and took the form to Ms. Daugherty.

22. The Acknowledgment of Test Sample, Test Sample Shipping Invoice and Official Veterinarian Report documents for these three horses were accepted into evidence as Board Exhibits 1-7. They were properly authenticated, and are business records. *Evidence Code section 1271.*

23. Norman E. Hester, Ph.D. is the Technical Director of Truesdail Laboratories, Inc. (hereinafter “Truesdail”), one of the board’s two official laboratories. Truesdail is a lab approved by the FDA. Dr. Hester is responsible for Truesdails’s protocols, or standard operating procedures, for its analytical processes.

24. Dr. Hester authenticated Data Packages I85595 (Level Starlet), I85619 (Grady’s Falcon), and I85620 (Cutting Edge). These Data Packages consist of a chain of custody forms, qualitative and quantitative documentation of sampling protocols, security procedures, records of the analysis, and confirmation analyses. Each Data Package is prepared in the same way.

25. The Data Package for Level Starlet was developed and completed by Truesdail personnel, and reviewed by Dr. Hester on June 9, 1998. The Data Package recorded the test results of the data generated by gas chromatography/mass spectroscopy (“GC/MS”) analysis. The Racing Lab Sample Receipt Checklist of the Data Package describing the chain of custody procedures of the testing at Cal Expo was consistent with Truesdail testing procedures. The checklist indicates there was no reason to question the security of the

transference of the sample. The Data Package documented that the Level Starlet test sample contained clenbuterol.

26. The Data Package for Grady's Falcon was developed and completed by Truesdail personnel, and reviewed by Dr. Hestor on June 9, 1998. The Data Package recorded the test results of the data generated by GC/MS analysis. The Racing Lab Sample Receipt Checklist of the Data Package itemized the chain of custody procedures of the testing at Cal Expo and was consistent with Truesdail testing procedures. The checklist indicated there was no reason to question the security of the transference of the sample. The Data Package documented that the Grady's Falcon test sample contained clenbuterol.

27. The Data Package for Cutting Edge was developed and completed by Truesdail personnel, and reviewed by Dr. Hestor on June 9, 1998. The Data Package recorded the test results of the data generated by GC/MS analysis. The Racing Lab Sample Receipt Checklist of the Data Package itemized the chain of custody procedures of the testing at Cal Expo and was consistent with Truesdail testing procedures. The checklist indicated there was no reason to question the security of the transference of the sample. The Data Package documented that the Cutting Edge test sample contained clenbuterol.

28. The Truesdail Data Packages for these three horses were properly authenticated as Board's Exhibits 10, 11, and 12, and received as business records. *Evidence Code section 1271.*

LEGAL CONCLUSIONS

29. Appellants argue that the CHRB has no authority to seek "new evidence" under Government Code section 11517(c) since the matter is simply a "record appeal" of a Board of Stewards' decision and cannot be a de novo hearing under Chapter 5 of the Administrative Procedures Act. At the same time, appellants also argue that Business and Professions Code section 19517(a) allows the Board to overrule a Board of Stewards' decision if "new evidence of a convincing nature" is produced. In this vein, appellants propose that since this proceeding is only a "record appeal" the only "new evidence" that can be introduced is by the appellants. The Board, in appellants' view, should only be allowed "rebuttal" evidence. In short, appellants argue the inconsistent positions that new evidence cannot be received but that they can offer new evidence. Finally, appellants contend that because appellants have the burden of proof under 4 CCR 1764, only appellants can offer evidence.

30. At the outset, the Notice of Disqualification afforded the appellants a right of appeal under Board regulations 1761 and 1762. Such appeals are proper "from every decision of the stewards." (Regulation 1761(a)). Appellants duly filed their appeals under these provisions, and requested and were granted a stay of forfeiture pending the outcome of

the appeals. The Notice of Hearing affords appellants a hearing “before a designated Referee of the Board, pursuant to section 1414, Title 4, California Code of Regulations”.

31. It is unnecessary to resolve whether the *appeals* of the Stewards’ decisions require a formal, de novo, adjudicative hearing under Chapter 5 of the APA, as apparently implied in the Board’s remand request under 11517(c), or simply a record appeal under Board rule 1761 and 1414. A jurisdictional determination on whether the Board derives its authority on remand from 11517(c), or from its original, plenary power under 4 CCR 1414, and 1761, to afford appellants due process rights of review is not required for a determination of this case. There are sufficient jurisdictional grounds under 1414 to review this appeal regardless of the authority of Government Code section 11517(c).

32. Business and Professions Code section 19582.5 and Board rule 1859.5 allow for summary disqualification and purse forfeiture without a hearing. This authority to summarily disqualify a horse upon positive testing finding for a prohibited drug is thoroughly reviewed in *Lavin v. California Horse Racing Board* (1997) 57 C.A.4th 263. No adjudicative hearing is required for the underlying decision of the Stewards to disqualify a horse and forfeit the purse. Nevertheless, the Board permits appeals of such summary proceedings presumably for the best interest of horse racing and to afford appellants a basic due process opportunity to contest the findings, or to correct any errors of law.

33. Business and Profession Code section 19517, provides that the Board may overrule any steward’s decision if a preponderance of the evidence indicates that (1) the steward mistakenly interpreted the law, (2) new evidence of a convincing nature is produced, or (3) the best interests of racing and the state may be better served. This authority allows for an evidentiary hearing to appeal Steward’s decisions.

34. Board rule 1859.5 is not an evidentiary rule, but a rule granting authority to the Board of Stewards. In order to *invoke* their authority, the Board of Stewards must assure that the elements of disqualification and forfeiture are present. Only when such elements are present can disqualification and forfeiture be ordered, pursuant to their authority. In this case, the Owner’s Notifications of Purse Forfeiture referred to confirmations from Truesdail of the original test findings. Once these findings were offered into evidence, the appellants clearly had the burden of showing that the test results in some way were incorrect or there was a misinterpretation of the law.

35. Notwithstanding the summary nature of the 1859.5 determination, the appellants had the opportunity to demonstrate that the Board of Stewards did not have a prima facie case for forfeiture. That is, the appellants had the opportunity to review the test methods and results. The appellants chose not to contest the substance of the testing documents except on hearsay evidentiary grounds. In fact, their counsel chose to depart the hearing prior to such evidence being considered and admitted. As such, the documents speak for themselves.

36. The underlying chemical testing documents were authenticated. These documents are the exclusive reasons for the disqualification and forfeiture of the purses won by the appellants.

37. The three horses were properly tested and the tests were found to be positive for a prohibited drug substance. In each case, the official test sample contained a prohibited substance under Rule 1859.5, Rules of the California Horse Racing Board (Title 4, Division 4, California Code of Regulations). Each appellant exercised their right to have a second test performed, by a testing lab recognized by the CHRB, and each sample tested positive for clenbuterol.

CONCLUSION

The consolidated appeal of the Board of Steward's April 16, 1999 rulings to disqualify the horses and forfeit the purses of appellants is DISMISSED.

Dated: _____

RAYMOND J. LEONARDINI
Administrative Law Judge
Office of Administrative Hearings